Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

JOHN ROBERT JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of his Sixth Amendment—right to counsel—where he was without counsel for two months prior to a complex RICO conspiracy trial, and where court-appointed counsel commenced trial preparation five days prior to trial and declined to seek a trial adjournment based on his "no continuance" agreement with the appointing court?

2. Whether the district court's appointment of counsel, conditioned on counsel's not seeking a trial continuance, comprised judicial action which rendered counsel's assistance to the defendant ineffective?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court.

John Robert Johnson (hereafter petitioner), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on June 16, 2000.

OPINION BELOW

The memorandum judgment of the United States Court of Appeals for the Eleventh Circuit, denying petitioner's request for a Certificate of Appealability (hereafter COA), was filed on June 16, 2000 (App. 1, *infra*). The district court's unpublished decision and judgment denying relief pursuant to 28 U.S.C. § 2255 was filed on March 10, 2000 and is reproduced at App. 2-9, *infra*. The district court denied petitioner's request for a COA on April 21, 2000 (App. 10-11, *infra*).

JURISDICTION

The memorandum judgment denying petitioner's request for a COA was issued by a panel of the United States Court of Appeals for the Eleventh Circuit on June 16, 2000 (App. 1, *infra*). No petition for rehearing was submitted. This petition for writ of certiorari follows within ninety days. 28 U.S.C. § 2101(c). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES INVOLVED

The United States Constitution, Sixth Amendment in pertinent part, provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. § 2253, in pertinent part, provides:

> § 2253. Appeal
>
> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall he subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right . . .

STATEMENT

1. Pretrial, Trial and Direct Appeal.

Petitioner was arrested in Boca Raton, Florida on August 19, 1989, and charged with a variety of offenses. A complex third superseding indictment was returned on July 28, 1994 against petitioner and several co-indictees by a Tampa federal grand jury; the superseding indictment charging, *inter alia*, RICO conspira-

cy, narcotic and homicide-related offenses (Orig. Dkt. 258). Petitioner was detained pending trial, and represented by court-appointed counsel. Following the return of the superseding indictment, the district court set a firm trial date of January 3, 1995 (Orig. Dkt. 321).

During October 1994, petitioner's court-appointed counsel, Stephen Crawford, Esq., advised the district court that he could no longer represent petitioner, and was therefore given leave to withdraw on or about October 28, 1994. On November 7, 1994, the district court appointed attorney David A. Dee, Esq., as petitioner's counsel (Orig. Dkt. 345) (thus an *actual lapse* of counsel for approximately two weeks between the time attorney Crawford's withdrawal and the appointment of attorney Dee). Attorney Dee failed to commence trial preparation, or communicate with petitioner after his November 7 court appointment, causing petitioner to submit *pro se* letters to the district court. Petitioner's *pro se* letters triggered a December 6, 1994 status conference before United States Magistrate Judge Elizabeth A. Jenkins (Orig. Dkt. 357, 364). During that December 6, 1994 status conference, Attorney Dee represented that he would actively communicate with petitioner and commence trial preparation (Orig. Dkt. 357, 364).

Contrary to attorney Dee's December 6, 1994 representations to Magistrate Judge Jenkins, he *never visited or communicated with petitioner, or otherwise commence to investigate or prepare petitioner's defense.* Thus, petitioner authored additional *pro se* letters to the district court, alerting the court to attorney Dee's lack of communication, investigation and preparation (Orig. Dkt. 384-387). Based on petitioner's *pro se* com-

munications with the district court, another status proceeding took place before Magistrate Judge Jenkins on December 27, 1994 (trial was less than one week away—January 3, 1995). In response to questions from the bench, attorney Dee conceded his lack of communication, investigation and preparation and his failure to keep [his] earlier representations to the court, *viz.*, sojourning to the local bastille for attorney-client consultations, along with pretrial [defense] investigation and preparation. Attorney Dee [on December 27] represented that he intended to spend the next few days with petitioner in defense investigation and preparation (Tr. 4-6).[1] With the court's permission, petitioner addressed the court, explaining that he had never spoken with attorney Dee until "today" . . . he didn't see how it was possible for him to be prepared (*Id.* at Tr. 6). *Inter alia*, Magistrate Judge Jenkins noted:

> THE COURT: I certainly share your concern that you hadn't met with him so far. When I appoint an attorney, and I think when any judge appoints an attorney, they expect that attorney to meet the client. Now, to a certain extent, I can appreciate the fact that Mr. Dee may not have wanted to meet with you until he had gotten a background briefing from Mr. Crawford, but that certainly should not have taken

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[1] Attorney Dee acknowledged that he had earlier received "three boxes full of materials . . . in addition to that, the government advised that they had Jencks materials available today which is a box twice the size of one of those, is what I was informed, for me to pick up today. And going through that, that is *what we're doing.*" (Magistrate Jenkins' transcript of 12/27/94 at Tr. 6) (reproduced in full as Group Ex. 3 to petitioner's original § 2255 filing).

> six or more weeks. However, I am without authority to grant either a continuance or a severance to you. What I will do is make a copy of this hearing available to the district judge.[2]

Adding insult to constitutional injury, attorney Dee told the court that he was scheduled to be out of town . . . leaving for a planned holiday on Friday (December 30, 1994). After additional colloquy, Magistrate Jenkins "*direct[ed]*" attorney Dee to "spend every possible minute" between now and Friday with petitioner, reiterating that attorney Dee was appointed on November 7, [1994] and suggested that attorney Dee might reconsider his [travel] plans.[3] In the aftermath of the Magistrate Jenkins/attorney Dee dialogue, the government opposed either a severance or a continuance (Tr. 7-10 of ROP-12/27/94).

On December 30, 1994, petitioner, attorney Dee and government counsel appeared before the trial court. *Prior* to hearing from the parties, the trial court advised petitioner that she had no intention of continuing

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[2] *Id.* at Tr. 7. Magistrate Judge Jenkins was mistaken regarding Attorney Dee getting a "background briefing"; no such briefing took place. There was merely a transfer of three or four legal-size boxes of materials from Crawford to Dee.

[3] Thus, Magistrate Judge Jenkins twice "directed" Attorney Dee to spend substantial time with the immured pretrial detainee between December 27 and 30, 1994. However, as petitioner's uncontradicted affidavit reveals, Attorney Dee left for his holiday on December 30, 1994 and did not see petitioner until immediately prior to jury selection on January 4, 1995. In the ensemble, Attorney Dee spent a total of six-hours with petitioner in connection with pretrial investigation and preparation; see App. 15, 17-18, *infra*.

the trial (Tr. 4).[4] Absent the benefit of Magistrate Jenkins' December 27, 1994 transcript, the trial court acknowledged receiving "several letters" from petitioner which culminated in the Tuesday (December 27, 1994) proceedings before Magistrate Jenkins (Tr. 4). Attorney Dee addressed the district court, explaining that he had met with petitioner on Tuesday, Wednesday and Thursday, but that petitioner had "strong concerns" regarding the lack of [trial] defense-investigation and preparation (Tr. 5). Attorney Dee explained that he was:

> *. . . in an awkward situation, as the Court is well aware of, in that when the appointment was issued, I was advised that I could not ask for a continuance. So, though my client does feel that way, and I think does wish to address the court about that, I'm in a—sort of an in-between manner here. I can't as his attorney and advocate forward his position, which is he wants a continuance, because I cannot ask for a continuance based on the Court's directive in my appointment order.*[5]

During further dialogue with the trial court, attorney Dee explained:

> If the Court's telling me, as my order was, I was to be ready for trial January 4th, I will be ready for trial January 4th. Uh, will I be ready to the satisfaction of my client is a different question.
>
> *If the Court's asking me what do I think would be a good, you know—if I were asking for a con-*

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[4] The December 30, 1994 district court transcript was part of petitioner's § 2255 filing at Group Ex. 4.

[5] Tr. of December 30, 1994 at Tr. 5; ital.emph. added.

> *tinuance, if that original order was lifted, I would probably tell the Court a short continuance would be beneficial.*
>
> * * * *
>
> So again, I mean, I'm in an awkward position here. The Court has told me I need to be ready for trial January 4th, so I'm going to be ready to go to trial January 4th.[6]

The trial court gave petitioner an allocution opportunity and the December 30, 1994, transcript discloses:

> THE DEFENDANT: Judge, my position is the same today as it was on the 27th, which was Tuesday of this week. * * * *Mr. Crawford withdrew as my attorney on the 28th of October. On the 7th of November Mr. Dee was appointed. I had no knowledge of his appointment until I wrote my first letter to you and was brought in front of Magistrate Jenkins the 6th of December. Now, that was the first time I even had knowledge who my attorney was. Mr. Dee was to see me the following day, the 7th of December. On the 20th of December I wrote you again, as I still hadn't seen Mr. Dee. We were ordered back in front of Magistrate Jenkins on the 27th, which was Tuesday, and that's the first time I had a conversation with an attorney that is now going to represent me at a complicated trial in four days.*
>
> THE COURT: Well, actually it—the trial itself begins on the 4th, which is a little more than four days.

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[6] *Id.* at Tr. 7, 9, ital.emph. added.

> THE DEFENDANT: And we have the weekend coming up, which is a holiday. We had a weekend last week, which was a holiday. In the three days that I've had conversations with Mr. Dee, multiple things have come up that he has no knowledge of, or that he looks at me and says, hum, we should send an investigator out on this. We're out of time, Judge.
>
> * * * *
>
> Well, Your Honor, Mr. Dee has not even been to the FBI office to review the evidence and material available in this case. I don't know, I'm not trying to—what are the ethics involved here of an attorney who doesn't even notify a client of his appointment to him for four weeks? And I don't even know if he would have done it then, had I not written to you.[7]

After all was said and done, the trial court refused to either sever or adjourn petitioner's trial. Attorney Dee left for his holiday and petitioner next saw him immediately prior to jury selection on January 4, 1995. Mixed guilty verdicts were returned on January 24, 1995 (Orig. Dkt. # 451), and on May 11, 1995, petitioner, at age 55, was sentenced to twenty-eight years in federal custody (Orig. Dkt. 534).

Petitioner had substitute court-appointed counsel on appeal. Save for sentencing arguments, the sole substantive appellate issue consisted of a single page (plus three-lines) contending that the district court erred in declining to grant petitioner's motion to adjourn his

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[7] *Id.* at Tr. 12-14; non-pertinent segments excluded; emph. added. Petitioner's descriptive appellation of the case [as] "complicated" stands unrebutted.

trial. On August 21, 1997, an Eleventh Circuit panel affirmed petitioner's conviction and sentence (unpublished order, No. 95-2646).

2. **Litigation Pursuant to 28 U.S.C. § 2255.**

On August 12, 1998, petitioner filed his motion, multiple exhibits and [his] affidavit in support of § 2255 relief. In substance, petitioner contended that he was *without counsel* from the time he was told of attorney Crawford's intention to withdraw (on or about October 20, 1994) to December 27, 1994 (the first time petitioner spoke with attorney Dee regarding the investigation and preparation for petitioner's defense on the complex RICO, drug and homicide charges—trial beginning in less than one week).

In petitioner's *uncontradicted* § 2255 affidavit (App. 12-18, *infra*) he asserted that his *pro se* letters to the district court on November 30 and December 20, 1994, prompted the two proceedings before Magistrate Judge Jenkins and the final pretrial conference before the trial court (December 6, 27 and 30, 1994). His letters revealed that attorney Dee *never spoke to, or otherwise attempted to communicate with petitioner*, and his *unrebutted* § 2255 affidavit recounted not only attorney Dee's lack of preparation and understanding of the complex RICO indictment, but further revealed that attorney Dee had no idea "who was who" in connection with co-indictees, potential government witnesses and the significance of petitioner's requested pretrial investigation (App. 14-17, *infra*). Petitioner's § 2255 affidavit further disclosed that attorney Dee *could not seek a trial continuance before the district court* on December

30 because "[attorney Dee's] agreement with the court would not allow him to do so" (App. 17).

The district court directed the government to file a response, and on October 2, 1998, the government filed a terse reply to petitioner's § 2255, simply taking the position that petitioner's verified filings and exhibits failed to support either an evidentiary hearing or § 2255 relief (Orig. Dkt. 685, 693).

On March 10, 2000, the district court entered an order denying § 2255 relief (Orig. Dkt. 717; App. 2-9, *infra*). Petitioner filed his timely notice of appeal on April 5, 2000 and on April 12, 2000, sought a Certificate of Appealability from the district court (which the district court rejected on April 21, 2000; App. 10-11).

Petitioner's timely COA application to the United States Court of Appeals for the Eleventh Circuit was rejected on June 16, 2000 (App. 1).

REASONS FOR GRANTING THE WRIT

1. Whether petitioner was deprived of his Sixth Amendment—right to counsel—where he was without counsel for two months prior to a complex RICO conspiracy trial, and where court-appointed counsel commenced trial preparation five days prior to trial and declined *to seek a trial adjournment based on his "no continuance" agreement with the appointing court?*

2. Whether the district court's appointment of counsel, conditioned on counsel's not seeking a trial continuance, comprised judicial action which rendered counsel's assistance to the defendant ineffective?

1. The Court's Sixth Amendment-right to counsel-decisions demand that petitioner have the benefit of effective and conflict-free counsel during all critical stages of the criminal proceeding.

A. Petitioner was without counsel during "critical stages" of the criminal case.

In *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199 (1964), Justice Stewart reviewed the Court's decisions regarding the need for counsel during the critical pretrial stages of a criminal proceeding:

> This view no more than reflects a constitutional principle established as long ago as *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, where the Court noted that "* * * during perhaps the most critical period of the proceedings * * * that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants * * * [are] as much entitled to such aid [of counsel] during that period as at the trial itself." Id., 287 U.S., at 57, 53 S.Ct., at 59, 77 L.Ed. 158.

377 U.S. at 205 (1964).[8]

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[8] *Powell v. Alabama* was cited with approval in the following cases referring to the constitutional requirement of counsel during "critical" pretrial stages; *United States v. Wade*, 388 U.S. 218, 224-25 (1967) (". . . As early as *Powell v. State of Alabama, supra*, we recognize the period from arraignment to trial was "perhaps the most critical period of the proceedings * * * during which the accused requires the guiding hand of counsel * * * if the guarantee is not to prove an empty right"); *Kirby v. Illinois*, 406 U.S. 682, 689, n. 6 (1972) (same); *United*

(continued...)

Part of Justice Sutherland's classic opinion in *Powell v. Alabama* includes:

> . . . but such designation of counsel as was attempted was either so indefinite *or so close upon the trial as to amount to a denial of effective and substantial aid in that regard.*
>
> * * * *
>
> ". . . *[i]t is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.*"

53 S.Ct. at 58, 60 (ital.emph. added).[9]

There is an obvious parallel between *Powell* and petitioner's case. Here, for all practical purposes, Attorney Dee was appointed less-than-seven-days before the commencement of a *complex* multi-count/multi-defen-

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[8] (...continued)
States v. Ash, 413 U.S. 300, 321-22 (1973) (Stewart, J., concurring) (same); *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975) (same); *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (same); *United States v. Henry*, 447 U.S. 264, 290-91 (1980) (same).

[9] See also, Justice Harlan's concurring/dissenting opinion in *Chambers v. Maroney*, 399 U.S. 42, 59, 90 S.Ct. 1975, 1985 (1970) (. . . the Court has recognized that the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel . . . .) (quotation marks and supporting authority omitted).

dant RICO and RICO conspiracy jury trial.[10] In *Powell*, there were six days between arraignment and trial: in the case at hand, trial counsel was on vacation from December 30, 1994-January 4, 1995. Hence, the total time for client consultation, [factual] investigation and legal preparation was limited to a total of approximately six-hours between December 27-29, 1994 (App. 15, 17-18).

Regarding the constructive denial of counsel, Circuit Judge Cox authored the majority opinion in *Vines v. United States*, 28 F.3d 1123 (11th Cir. 1994), in part, explaining:

> In the companion case to *Strickland*, *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the Supreme Court carved out a narrow exception to the two prong *Strickland* test. *Cronic* recognizes that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* 466 U.S. at 658, 104 S.Ct. at 2046. *Cronic* teaches that prejudice will be presumed if: (1) *counsel is completely denied; (2) counsel is denied at a critical stage of trial*; or (3) counsel fails to subject the prosecution's case to meaningful

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[10] Petitioner's "complex" appellation, *viz.*, RICO, has support in Supreme Court precedent, see Justice O'Connor's concurring opinion in *Shearson/American Express, Inc., et al. v. McMahon, et al.*, 482 U.S. 218, 239, 107 S.Ct. 2332 (1987) (Antitrust matters are every bit as *complex* as RICO claims . . . .); accord, Justice White's concurring opinion in *Tafflin, et al. v. Levitt, et al.*, 493 U.S. 455, 468, 110 S.Ct. 792 (1990) (RICO is an *unusual* federal criminal statute . . .) (ital.emph. added).

> adversarial testing. *Id.* at 659, 104 S.Ct. at 2047. This presumption of prejudice is seemingly irrebuttable since "the cost of litigating [its] effect . . . is unjustified." *Id.* at 658, 104 S.Ct. at 2046.

28 F.3d at 1127 (emph. in original and added).[11]

At bar, petitioner's contention of complete [constructive] denial of counsel during the critical *eight-weeks between-at least-October 28 to December 27*, is supported by the December 27 and 30, 1994 hearing transcripts. One need look no further than the *Cronic* analysis offered by Circuit Judge Cox to find prejudicial error here. Beyond peradventure, petitioner was *without counsel at a critical stage*—the eight-weeks between October 28 (when attorney Crawford withdrew) and December 27, 1994 (petitioner's first meeting with attorney Dee). Petitioner's complex RICO jury trial was set for January 4, 1995 and attorney Dee consulted with petitioner only on December 27, 28 and 29 (a total of approximately six-hours) before forsaking petitioner for his scheduled holiday (December 30-January 3, 1995). Petitioner suffered from [a] complete deprivation of counsel—a situation hostile to harmless error balancing.[12] Circuit Judge Birch's dissenting opinion in *Vines*

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[11] The district court's discussion and analysis of *United States v. Cronic* is reproduced at App. 6, *infra*.

[12] See *Penson v. Ohio*, 488 U.S. 75, 88-89, 109 S.Ct. 346, 354-55, 102 L.Ed.2d 300 (1988) (prejudice presumed when there is a complete denial of counsel); *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.").

cited, *inter alia*, *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) and *Maine v. Moulton*, 474 U.S. 159, 170 (1985), for propositions which include that the accused "requires the guiding hand of counsel at every stage of proceedings against him," and:

> Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at *earlier*, "critical" stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the *trial itself* to a mere formality.'

28 F.3d at 1140 (ital.emph. added).[13]

In *Roe v. Flores-Ortega*, 529 U.S. ___, 120 S.Ct. 1029 (2000), the Court again visited the right to counsel during critical stages of a judicial proceeding. Justice O'Connor explained:

> In *Cronic*, *Penson* and *Robbins*, we held that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." *Cronic*, *supra*, at 659, 104 S.Ct. 2039.

120 S.Ct. at 1038.

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[13] In accord, *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1473 (11th Cir.) ("The Sixth Amendment right to counsel serves *'to assure aid at trial,'* and therefore attaches at the commencement of adversary judicial criminal proceedings . . . [and] *extends to those 'critical' pretrial proceedings* in which 'the accused is confronted, *just as at trial*, by the procedural system . . . .'" (emphasis added) (citations omitted)).

Predicated on impleaded Supreme Court and blended federal circuit authorities, petitioner advances that which precedent embraces: he was denied, constructively and otherwise, the assistance of counsel during the *critical pretrial stages* of a complex criminal case for which he is now serving the functional equivalent of life in prison.

Thus, the decision below is in clear conflict with Justice O'Connor's analysis and explanation of the "contrary to" and "unreasonable application" [of] clauses in *Williams v. Taylor*, 120 S.Ct. at 1523 (2000). Further, petitioner maintains that since reasonable jurists could clearly find the district court's assessment of his constitutional claims "debatable or wrong," he has clearly satisfied the COA mandates found in 28 U.S.C. § 2253(c) (in accordance with Justice Kennedy's opinion in *Slack v. McDaniel*, 529 U.S. ___, 120 S.Ct. 1595, 1604 (2000)).

B. Appointed counsel's divided loyalties comprised a clear conflict of interest.

The failure to seek a continuance on petitioner's behalf because of a court-appointment forbiddance stands in stark contrast to the Supreme Court's definitive rulings that defense counsel, private or appointed, must serve the undivided interest of his or her client. The record at hand clearly discloses attorney Dee's divided loyalties (appointing court -vs- petitioner) and, thus, is clearly contrary to the Court's precedent.

The district court misinterpreted *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 1039 (1984), where, in part, the Court explained that the relationship between

counsel and the court was such that the advocate *owed his loyalty to the accused, not the court,* citing *Jones v. Barnes* (*"To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court"*), 466 U.S. at 656, n. 17 (ital.emph. added). In *Ferri v. Ackerman*, 444 U.S. 193, 100 S.Ct. 402 (1979), the Court held that attorneys appointed under the Criminal Justice Act are not immune, as a matter of law, to actions brought against them for malpractice. The *sine qua non* for the Court's declination to immunize CJA-appointed counsel was ". . . appointed counsel's *principal responsibility is to serve the undivided interest of his client* . . .," 444 U.S. at 204 (ital.emph. added).

In *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467 (1942), the Court found the divided loyalties of defense counsel deprived the defendant of his Sixth Amendment rights to counsel. In part, the Court explained:

> The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. * * * Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from . . . even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that diversion is brought home to the court . . . . It is especially important that he be given the benefit of the *undivided assistance of his counsel without the court's becoming a party to encumbering that assistance.*

315 U.S. at 76 (ital.emph. added).

Petitioner contends that one of *Glasser's* components is particularly *apropos*. In *Glasser*, the district court became involved in deciding whether a single attorney could represent more than one interest during that criminal trial. In petitioner's case, the district court's appointment of attorney Dee was conditioned on a no-continuance court-appointment-agreement. Yet through no fault of petitioner's, appointed counsel eschewed investigation, preparation and communication from the date of [his] *conditioned* appointment (November 7, 1994) to and including December 27, 1994 (when appointed counsel was *directed* by Magistrate Judge Jenkins to commence his legal preparation, investigation and consultations).[14]

The Court's decision clearly demonstrates that counsel, appointed or private, owe an undivided loyalty to the accused and must function as an advocate for the defendant—not a friend to the court. The record in this case clearly reveals that appointed counsel's divided loyalties undermined counsel's principal responsibility . . . "to serve the undivided interest of his client," *Ferri, ante*, 444 U.S. at 204.

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[14] Federal circuits have recognized an "actual lapse in representation" in cases involving divided loyalty, e.g., *Winkler v. Keane*, 7 F.3d 304, 309 (2nd Cir. 1993) (Such a lapse of representation occurs when counsel, acting under a divided loyalty, forgoes some plausible alternative strategy of defense.); cited with approval in *Triana v. United States*, 205 F.3d 36, 41 (2nd Cir. 2000).

2. Whether the district court's appointment of counsel, conditioned upon counsel's not seeking a trial continuance, comprised judicial action which rendered counsel's assistance to the defendant ineffective?

Petitioner maintains that a confluence of appointed counsel's inattentiveness, blended with judicial action and inaction, rises to the level of *per se* prejudice. In *United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665 (1981), the Court vacated an order of indictment dismissal, finding indictment dismissal *indecorous* where government agents met with *Morrison*, absent her counsel's knowledge or permission. Within the fabric of Justice White's opinion for the Court, he explained:

> The Sixth Amendment provides that an accused shall enjoy the right "to have the Assistance of Counsel for his defense." This right, fundamental to our system of justice is meant to assure fairness in the adversary criminal process. * * * Our cases have accordingly been responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective (multiple citations omitted). * * * In *Geders v. United States, supra, Herring v. New York, supra,* and *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932), *judicial action before or during trial prevented counsel from being fully effective.* * * *

449 U.S. at 364 (int. supporting cits. omitted, ital.emph. added).

Petitioner contends that *judicial action before his trial prevented counsel from being fully effective* (quoting from *Morrison, ante*, 449 U.S. at 364). To explain: attorney Dee's appointment below was conditioned on his not requesting a trial adjournment (as the Decem-

ber 30, 1994 district court proceedings confirm). Yet the appointing judicial officer rejected petitioner's plaints regarding appointed counsel's complete inattention to petitioner's case prior to December 27, 1994. And on December 30, 1994, the trial court transcript disclosed that:

> (a) Appointed counsel could not request a trial adjournment because of his "condition" of appointment, and
>
> (b) That appointed counsel was not ready to defend petitioner. Nonetheless the district court demanded that the trial proceed as scheduled. If *United States v. Morrison*, *ante*, is controlling then—"judicial action before . . . trial prevented counsel from being fully effective."

Absent contradiction, the record discloses that from some time in mid or late October 1994 to at least December 27, 1994, petitioner was without counsel. His case involved complex RICO issues, multiple counts and defendants and the presentation of over twenty prosecution witnesses. Petitioner's uncontradicted § 2255 affidavit discloses that appointed counsel visited with him three times for a period of approximately six hours, suggested, but never retained, an investigator to do some work, refused to seek a trial adjournment based on his lack of preparation, and instead of using from December 30, 1994 to January 3, 1995 to prepare for trial—left for a New Year's holiday, App. 17-18.

Judicial inaction is plain and obvious. The trial court, *prior* to hearing from either petitioner or counsel, voiced her bench conclusion that petitioner's case would not be continued (ROP, 12/30/94 at Tr. 4). Notwithstanding the trial court's advance-no continuance-man-

date, defense counsel reminded the motivated reader that he could not seek a trial adjournment because of his "no continuance" agreement when appointed to represent petitioner on November 7, 1994. Recall that petitioner was without counsel from mid-October 1994 (when attorney Crawford withdrew) to December 27, 1994 (when attorney Dee first spoke with petitioner at the direction of Magistrate Judge Jenkins).

A sentence from Justice O'Connor's opinion in *Roe v. Flores-Ortega* bears repeating:

> In *Cronic, Penson* and *Robbins*, we held that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." *Cronic, supra*, at 659, 104 S.Ct. 2039.

120 S.Ct. at 1038. At bar, petitioner's trial was rendered "presumptively reliable" based on the confluence of judicial action and [in]action.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ALLAN A. ACKERMAN, Esq.
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorney for Petitioner

APPENDICES

App. 1

[Filed June 16, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11781-C

JOHN ROBERT JOHNSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the Untied States District Court
for the Middle District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2).

/s/ GERALD BARD TJOFLAT
UNITED STATES CIRCUIT JUDGE

App. 2

[Filed March 10, 2000]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA FLORIDA

JOHN ROBERT JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No.
98-1649-Civ-T-24(C)
93-180-Cr-T-24(C)

ORDER

This cause comes before the Court on petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. No, 681). Respondent has filed a response in opposition (Doc. No. 692). Also before the Court is petitioner's motion to supplement (Doc. No. 687) and petitioner's reply to respondent's response in opposition (Doc. No. 694).

I. *Petitioner's Reply (Doc. No. 694)*

As an initial matter, the Court must note that pursuant to Local Rule 3.01(b), Middle District of Florida, petitioner's reply to respondent's response in opposition (Doc. No. 694) is unauthorized due to the fact that petitioner did not seek leave to file such a reply. Accordingly, the aforementioned reply will not be considered by the Court and is hereby stricken from the record.

II. *Petitioner's Motion to Supplement (Doc. No. 687)*

Petitioner has moved the Court for leave to supplement his original motion under section 2255 to include a "Singleton-Lowery" argument. *See* Doc. No. 687. While respondent has addressed the merits of such an argument in its response in opposition, it has not raised any argument to the petitioner's request to make a supplemental argument at this stage of the proceeding. Given this fact, petitioner will be allowed to supplement his original motion to include his "Singleton-Lowery" argument.

III. *Petitioner's Motion Under Section 2255*

As a general matter, petitioner's motion for relief under section 2255 is founded on ineffective assistance of counsel. In simplified form, petitioner makes the following specific arguments:

1. That he was denied effective counsel due to the fact that his trial counsel was burdened with an appointment agreement with the Court that no continuances would be granted in the criminal action that underlies this petition;
2. That he was denied any counsel at all between the dates of October 28, 1994 and December 27, 1994;
3. That his trial counsel's lack of preparation prejudiced him it trial;
4. That his counsel had an improper conflict of interest;
5. That his appellate counsel failed to prosecute his appeal of the underlying criminal action with objective reasonableness.

(A). *The Court's Decision not to Continue or Sever*

The lion's share of petitioner's argument is based on the fact that the Court refused to continue or sever the trial of the underlying criminal action. According to the petitioner, his trial counsel was appointed with the contingency that no continuances would be granted in the subject criminal matter. The petitioner asserts that this contingency on trial counsel's appointment constituted per se constitutional error. Assuming that such a contingency was in fact made, that fact does not warrant relief for the petitioner under section 2255. To be sure, the Court did make it clear that the underlying multi-defendant criminal action at issue here would not be continued. *See* Transcript of December 30, 1994 Status Conference, page 4, line 3. Thus, the issue as it related to the petitioner at the time was whether the Court would sever his case from the trial of his co-defendants, and not whether the Court would grant a continuance. On this issue, the court noted the following:

> Mr. Johnson, I do not intend to continue this case. My options would be to sever you from this case and try you alone. I would prefer not to do that, obviously, in the interest of judicial economy, and I'm not convinced on what I've been told here today that there is prejudice involved.
>
> And I've stated that, you know, my intention is actually to begin the evidentiary portion of the trial probably about Friday of next week, so there is still a substantial period of time before any evidence begins. There are a number of co-defendants charged in the same counts, same predicate acts you are with the representation,

> and there is going to be or there are going to be mutual objections made, I'm sure, on behalf of all defendants in the Government's case.
>
> . . . I haven't heard evidence sufficient to allow me to convince me that there's any prejudice involved such as I should sever this case.

Transcript of December 30, 1994 Status Conference, Pages 13-14. Therefore, even if petitioner's trial counsel was appointed with the understanding that no continuances would be granted, that fact is not relevant here. Independent of such an understanding, the Court found that based on the facts as they were at the time, no good reason existed to sever petitioner's case. Accordingly, petitioner's argument of a per se constitutional error with regard to the Court's unwillingness to grant a continuance is without merit.

(B). *Denied Counsel Between October 28 and December 27, 1994*

Petitioner's next argument is that between the periods of October 28, 1994 and December 27, 1994, he was denied any counsel at all. On October 28, 1994, petitioner's original appointed counsel was allowed to withdraw. Shortly thereafter on November 7, 1994, petitioner was appointed new counsel by the Court. Despite this fact, however, petitioner contends that as a practical matter, he was not provided counsel until seven days before trial due to the fact that after his November 7, 1994 appointment, trial counsel only met with him approximately six hours between the dates of December 27 and December 29, 1994. In other words, while petitioner had actually been appointed new coun-

sel months before his trial, he contends that he was "constructively" denied any counsel at all due to trial counsel's inaction. The Court disagrees.

In *United States v. Chronic*, 466 U.S 648, 659 (1984), the court held that prejudice can be presumed when (1) a defendant is completely denied counsel; 2) counsel is denied at a critical stage of trial; or 3) counsel fails to subject the prosecution's case to meaningful adversarial testing. Obviously, petitioner was not completely denied counsel, and petitioner does not argue that his trial counsel failed to subject the prosecution to a meaningful adversarial testing. Thus, to rely on the *Cronic* presumption, petitioner must show that he was denied counsel, either actually or constructively, at a critical stage of trial. As an initial matter, the Court must note that petitioner's assertions that the pre-trial periods of time in dispute here were "critical stages" of the trial is questionable. Indeed, the Eleventh Circuit has held that the taking of evidence at the actual trial of a matter is not a per se critical period under *Cronic*. See *Vines v. United States*, 28 F.2d 1123, 1128 (11th Cir. 1994). However, even if the Court were to presume that the pre-trial dates in question here were "critical", the Court cannot say that petitioner was actually or constructively denied counsel during those periods. As noted above, the Court, after a hearing, determined that petitioner was not entitled to be severed from his co-defendants due to the fact that there was no evidence that he would be prejudiced by going to trial due to any lack of preparation on the part of trial counsel. Therefore, even if the pre-trial periods at issue here are considered critical under *Cronic*, the Court finds that petitioner was provided adequate counsel during those periods and no per se prejudice is present in this case.

(C). *Trial Counsel's Lack of Preparation at Trial*

The benchmark for judging a claim for ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). To establish a claim for relief based upon ineffective assistance of counsel, a petitioner must show that (1) his/her counsel's representation was deficient; and (2) that the deficient representation prejudiced the petitioner. *See Strickland*, 466 U.S. at 687.

In the instant petition, petitioner vaguely asserts claims of ineffective assistance of counsel without pointing to any evidence that his counsel's conduct fell below an objective standard of reasonableness. *See id.* at 468. Vague, conclusory, speculative, or unsupported assertions cannot support an ineffective assistance of counsel claim. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Furthermore, the record belies any assertion of ineffective counsel due to the fact that petitioner was acquitted on six of the eight predicate acts of racketeering against him. Given petitioner's complete lack of support for his argument, he is not entitled to relief grounds on lack of preparation.

(D). *Trial Counsel Had an Improper Conflict of Interest*

As his next argument, petitioner contends that trial counsel had an improper conflict of interest due to the fact that prior to his appointment, he had agreed with the Court that he would not seek a continuance. Although this matter is fully addressed above, the Court

must note that despite any agreement that trial counsel may have made with the Court, he did in fact ask for a continuance and/or severance of petitioner's case. *See* Transcript of December 30, 1994 Status Conference, page 7, lines 21-25. Although the Court had preemptively closed the possibility of a continuance, the Court allowed petitioner to be fully heard on the issue of a severance, and this fact renders any possible conflict trial counsel may have had regarding a continuance moot.

(E). *Appellate Counsel was not Objectively Reasonable*

As a final ineffective assistance argument, petitioner argues that his appellate counsel was not objectively reasonable in prosecuting his appeal. The bulk of this argument is based on the fact that appellate counsel did not vigorously pursue an argument based on the "conflict of interest" trial counsel had with this Court. As noted above, however, that argument is without substance, and appellate counsel was objectively reasonable in handling that argument on appeal. As for the remainder of petitioner's appellate arguments, he fails to specifically identify how his counsel was not objectively reasonable, and vague, conclusory, speculative, or unsupported assertions cannot support an ineffective assistance of counsel claim. *See Tejada*, 941 F.2d at 1559.

(F). *Petitioner's "Singleton-Lowery" Argument*

In a supplemental motion, petitioner urges the Court to grant him relief based on the holdings in *United*

States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), and *United States v. Lowery*, 15 F.Supp. 2d 1348 (S.D. Fla. 1996). According to the petitioner, those cases hold that the government cannot offer anything of value to a putative prosecution witness in exchange for securing the testimony and cooperation of that witness. However, *Singleton* and *Lowery* are not "good law", and petitioner's argument is meritless. *See U.S. v. Singleton*, 165 F.3d 1297 (10th Cir. 1999); *U.S. v. Lowery*, 166 F.3d 1119 (11th Cir. 1999).

Accordingly, it is ORDERED AND ADJUDGED that petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C., § 2255 (Doc. No. 681) is DENIED. Petitioner's motion to supplement (Doc. No. 687) is GRANTED to the extent that it supplements the argument made in Doc. No. 681, and is DENIED on its merits. Petitioner's reply to respondent's response in opposition (Doc. No. 694) is STRICKEN from the record. The Clerk is instructed to CLOSE this case and all other pending motions are DENIED AS MOOT.

DONE AND ORDERED at Tampa, Florida, this 10th day of March, 2000.

/s/ Susan C. Bucklew
SUSAN C. BUCKLEW
United States District Judge

Copies to:

Counsel of Record

App. 10

[Filed April 21, 2000]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA FLORIDA

JOHN ROBERT JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No.
98-1649-Civ-T-24(C)
93-180-Cr-T-24(C)

ORDER

This cause comes before the Court on petitioner's Application for Issuance of a Certificate of Appealability (Doc. No. 721). In that motion, petitioner requests the Court to grant his request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c), and Rule 22, Fed. R. App. P. Pursuant to section 2253, a certificate of appealability should issue only if the petitioner makes a substantial showing of the denial of a constitutional right. Upon review of this case, such a showing has not been made.

Accordingly, it IS ORDERED AND ADJUDGED that petitioner's Application for Issuance of a Certificate of Appealability (Doc. No. 721) is DENIED.

DONE AND ORDERED at Tampa, Florida, this 21 day of April, 2000.

/s/ Susan C. Bucklew
SUSAN C. BUCKLEW
United States District Judge

Copies to:

Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA FLORIDA

UNITED STATES OF AMERICA,	:	
	:	
vs.	:	Civil No.
	:	Criminal No.
JOHN ROBERT JOHNSON,	:	93-180-CR-T-24
	:	
Defendant.	:	

AFFIDAVIT OF JOHN ROBERT JOHNSON

John Robert Johnson, being first duly sworn, on oath, deposes and states:

1. On approximately October 15, 1994 I received information from an attorney in Chicago, Illinois that the attorney representing me in case no. 93-180-CR-T-24, Stephen M. Crawford, had been accused by defendants in another case (one of which Mr. Crawford represented), of leaking information to the U.S. Attorney's office. This leak of information allegedly resulted in another indictment being brought against these defendants. These defendants signed affidavits to this effect.

On October 18, 1994 a story appeared in a local Tampa, Florida newspaper alleging Mr. Crawford's remarks, in letter form, to yet another client. These remarks, racial in nature, concerning a black judge, caused Mr. Crawford's law firm to terminate his employment.

At a meeting with Mr. Crawford on October 20, 1994 he informed me that "He really wasn't sure where he would be on January 4, 1995." January 4, 1995 was the date of our trial. Because of these matters, I informed Mr. Crawford that I no longer felt that he was in any position to adequately defend me in this case. When I asked for an explanation of allegations against him, he refused to discuss any of the matters; he simply denied the allegations. We mutually agreed that he would submit a motion for substitution of counsel and on October 28, 1994 at a hearing (in camera) this motion was granted. I was told by Magistrate Jenkins at this hearing that another attorney would "soon" be appointed.

On November 1, 1994 I received my last letter from Mr. Crawford telling me he was "cautiously optimistic" that another CJA attorney would take over my defense in the next week. He also explained that he had been in contact with the attorney who had represented me in my Texas case, who had promised to send him a "box load" of materials gathered in that case. Mr. Crawford also stated in his letter that he would "disseminate this to my new counsel and that he would hand this out to other counsels accordingly."

On November 28 and 30, 1994 my collect calls to Mr. Crawford's office were refused. I had no communication from anyone regarding new counsel being appointed.

2. On November 30, 1994 I wrote a letter to Judge Bucklew informing her of this situation.

On December 5, 1994 I received a letter from Mr. Crawford, with copies apparently to all other attorneys representing other defendants in this case. This letter informed me that David Dee had been appointed to

represent me (which none of the other lawyers had been aware of).

3. On December 6 or 7, 1994 I appeared before Magistrate Jenkins. I briefly spoke with Mr. Dee before the hearing started. Either before or during this hearing, Mr. Dee stated he would visit with me the following afternoon. He never did. On December 20, 1994 after still never having met with Mr. Dee, I again wrote to Judge Bucklew.

4. On December 27, 1994 I was called back to Magistrate Jenkins' court. I made an oral motion for continuance or severance. Mr. Dee had yet to consult with me regarding my trial which was scheduled one week later (January 4, 1995). This motion was referred to Judge Bucklew. Mr. Dee was "directed" to spend the next three days conferring with me. Later that evening, Mr. Dee met with me in the Hillsborough County Jail. Mr. Dee brought with him a two wheel dolly with four or five large boxes of "legal materials." We started with the top box, which contained assorted reports, surveillance, motions, hearings, crime lab reports, trial transcripts, mostly of a state of California proceeding against five of my co-defendants. Mr. Dee asked what relevance I attached to these papers. I asked Mr. Dee if he was aware of the fact that I was incarcerated at the time of those proceedings, and that I was not even acquainted with some of those people. His reply was "no he wasn't." I then asked him if he had gone over the material contained in the boxes he had brought into the jail. His answer was that "My associate has gone through some of this." I again asked if *he* had read this material: his reply was "not really." Mr. Dee told me he had "just read" the indictment and found it "very

confusing." He then asked me various questions about the contents of the indictment and asked me to "explain" them. We discussed the case in very general terms. It was clear that Mr. Dee was not at all familiar with my case.

Mr. Dee explained that he had been involved with another case that had "run over" the original time he had thought it would. I asked him if he thought it was a little late to be starting on my case, and he replied that "He would do the best he could." I asked if he had received a box of material from Mr. Crawford about my Texas case that an attorney in Chicago was supposed to forward. He said he knew nothing of such a box. After scanning one box of material, Mr. Dee left leaving a second box for my "review." This first meeting lasted about two hours.

5. On December 28 1994 Mr. Dee returned to the jail. In addition to the previous material, he brought a box of Jencks material apparently picked up that day. After a general discussion of some of the things I thought should be addressed, Mr. Dee again brought up the fact that he had been on trial with a "private" client and really hadn't had time to go through any of this material. He told me that the fact that there were "so many names and different dates" was not helping. At this time I gave Mr. Dee a list of things I thought important. The list included:

a) Manager of Bakes Jewelry Store stated on a police report (that I obtained in my prior case but not made available in this discovery) that he could not identify jewelry as there were no markings on such. This individual was not on list of witnesses.

b) Same Bakes Jewelry store was robbed again in 1991—"using similar method" according to a newspaper article.

c) Contact a jewelry "expert" for possible rebuttal testimony. Jewelry identified as coming from Bakes was "generic."

d) Wanted a person interviewed who the FBI in Chicago played a tape of her former husband and Ristich to. On this tape murders were discussed. During the trial, the government denied the existence of this tape.

e) Zischke testified to Grand Jury that he "cased" Bakes Jewelry with me. He described the store as being in an "industrial" area. I wanted investigator's confirmation that it was in fact in a "residential" area.

f) Wanted Spencer's Jewelry examined as to where it came from.

g) Had a copy of two different affidavits made by a Sarasota County Deputy Sheriff claiming the same hair (found in a cap robbers left behind) belonged to two different individuals. Possible "Franks" hearing.

h) Wanted a copy of Spencer's Kentucky bond revocation hearing. In this he stated he was not in fear of his life.

i) I wanted a handwriting expert to compare my writing with Green Bay, Wisconsin motel registration forms.

j) I had learned that Ristich had twice been arrested in Chicago in possession of silencers. This did not show up on rap sheet. I knew an attorney who represented him in one case, and the name of a police officer who arrested him in the other. I asked Mr. Dee

if an investigator could contact these individuals to confirm the silencer arrests.

Mr. Dee's reply was "we should get an investigator on this." Again my response was that it seemed a little late for that. I then asked Mr. Dee to try and continue the trial so that a complete investigation could be conducted. He told me he couldn't do this. He had agreed with either Magistrate Jenkins or Judge Bucklew when he accepted the appointment that he would be ready for trial on January 4, 1995 and was told then that there "would be no continuances." Mr. Dee then asked me "what I thought our defense should be." I told him that I had been waiting to address this question since late October 1994. Again we discussed issues in a general manner.

On December 29, 1994 Mr. Dee returned to the jail. Mr. Dee continued to quiz me on "who was who." Again I brought up matters that begged to be investigated. I asked Mr. Dee if he could spend the weekend going over the case with me. Mr. Dee informed me he was leaving on the 30th of December for a vacation and would not return until the evening before trial (January 3, 1995). Again, we spent two hours reviewing some of the discovery materials. Mr. Dee seemed anxious to depart for his planned holiday.

6. On December 30, 1994 I appeared in front of Judge Bucklew and my motion for continuance or severance was denied. I saw Mr. Dee for about 15 minutes at the jail. He said he was sorry he didn't push for a continuance, but felt his "agreement with the court" would not allow him to do so. I asked why he hadn't argued for severance. For the same reason he

answered. Mr. Dee asked me to "keep reading," and said he would see me before court. The next time I saw him was in court just before jury selection. No investigator was sent to investigate the matters I had requested be the subject of investigation, including all the matters relating to the Bakes Jewelry store robbery.

On January 4, 1995 trial started. On January 24, 1995 verdicts were returned by the jury. Mr. Dee briefly visited with me twice at the jail during my trial. I felt during this time period that I could certainly be of help in briefing Mr. Dee as to the possible nature of testimony or suggesting rebuttal. At any rate this was not done.

_____

John Robert Johnson

SUBSCRIBED and SWORN to
before me this ____ day
of August, 1998.

_____

Notary Public/Pekin Prison Officer